IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 32.

UNITED STATES OF AMERICA,
Appellant,

vs.

A & P TRUCKING CO., a partnership composed of ALEX SCHUB, ALDO IAFRATE, and ARTHUR CLOUGH; and SOL LIEBMAN,
Appellees.

UNITED STATES OF AMERICA,
Appellant,

vs.

HOPLA TRUCKING COMPANY, a partnership composed of WILLIAM LEVINE and MELVIN ULRICH,
Appellees.

APPELLEES' MOTION TO AFFIRM JUDGMENT OF DISMISSAL ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

MOTION TO AFFIRM.

AUGUST W. HECKMAN,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 754.

UNITED STATES OF AMERICA,

Appellant,

v.

A & P TRUCKING CO., a partnership composed of Alex Schub, Aldo Iafrate, and Arthur Clough; and Sol Liebman,

Appellees.

UNITED STATES OF AMERICA,

Appellant,

v.

HOPLA TRUCKING COMPANY, a partnership composed of William Levine and Melvin Ulrich,

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APPELLEES' MOTION TO AFFIRM JUDGMENT OF DISMISSAL ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

MOTION TO AFFIRM.

Appellees move the Court to dismiss the appeal herein on the grounds hereinafter set forth or to affirm the judgment sought to be reviewed on the appeal on the ground that it is manifest the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

/s/ AUGUST W. HECKMAN,
August W. Heckman,
Counsel for Appellees.

/s/ ANTHONY J. CIOFFI,
Anthony J. Cioffi,
Of Counsel.

Opinion Below.

The District Court did not write an opinion. In the Orders which dismiss the informations it is set forth that the defendant partnerships as entities are not subject to criminal liability. The Orders dismissing the informations are set forth in the Appendix, infra, pp. 15, 16.

Jurisdiction.

The jurisdictional requisites are fully set forth in appellant's "Jurisdictional Statement."

Statutes Involved.

The Interstate Commerce Act, Part II, 49 Stat. 543, as amended, provides in pertinent part:

Section 222 (a) [49 U. S. C. 322] (a):

> Any person knowingly and willfully violating any provision of this part, or any rule, regulation, requirement, or order thereunder, or any term of condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than $100.00 for the first offense and not more than $500.00 for any subsequent offense. Each day of such violation shall constitute a separate offense.

Section 203 (a) [49 U. S. C. 303] (a):

> As used in this part—
>
> (1) the term "person" means any individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes any trustee, receiver, assignee, or personal representative thereof.

18 U. S. C. 835 provides in pertinent part:

> The Interstate Commerce Commission shall formulate regulations for the safe transportation within the limits of the jurisdiction of the United States of explosives and other dangerous articles, * * * which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives or other dangerous articles by land * * *
>
> * * * * * *
>
> Whoever knowingly violates any such regulation shall be fined not more than $1,000 or imprisoned not more than one year, or both * * *.

1 U. S. C. 1 provides in pertinent part:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise——
>
> * * * * * *
>
> the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;
>
> * * * * * *

Question Presented.

Whether a partnership is a legal entity separate from the partners for the purposes of criminal liability under 18 U. S. C. 835 and 49 U. S. C. 322 (a).

Statement.

On July 5, 1956, the government filed a criminal information in the United States District Court for the District of New Jersey against A & P Trucking Co., a partnership common carrier by motor vehicle, composed of Alex Schub, Aldo Iafrate, and Arthur Clough; and Sol Liebman, one of its drivers. Said information against the A & P Trucking Company, a partnership, charged the partnership, in count (1), with an offense under 18 U. S. C. 835 by the transportation of dangerous articles in a manner violating regulations of the Interstate Commerce Commission; in count (2), with a violation of 49 U. S. C. 322 (a) and a regulation of the Commission, in that the company permitted the operator to drive without having been physically examined and certified as meeting minimum physical requirements; in count (3), with a violation of 49 U. S. C. 322 (a) and a regulation of the Commission by failing to equip a truck with a fire extinguisher; and in counts (4)-(35), with various operations as a common carrier, without a certificate of public convenience and necessity, in violation of 49 U. S. C. 306 (a) and 322 (a).

On July 6, 1956, the government filed a criminal information in the United States District Court for the District of New Jersey against Hopla Trucking Company, a partnership composed of William Levine and Melvin Ulrich a common carrier by motor vehicle. The two-count information against the Hopla Trucking Company, a partnership, charged the partnership, as an entity, with offenses under 18 U. S. C. 835 in that it transported flammable liquid by motor vehicle in a manner violating I. C. C. regulations.

The government conceded that the individual partners did not have personal knowledge of the facts out of which the violations arose.

On November 14, 1957, counsel for the defendants made a motion to quash the informations in that the statutes 18 U. S. C. 835 (*supra*, p. 3) and 49 U. S. C. 322 (a) (*supra*, p. 2) punishes those, "whoever knowingly violates" (*supra*, pp. 2-3) and that in the present case the defendants are partners in a business enterprise for which the government seeks to hold them criminally responsible for violations committed by their employees without their personal knowledge.

The government proceeded on the theory that the alleged knowledge of the violations by the employees of the defendant co-partnerships is imputed to them.

District Court Judge William F. Smith dismissed the informations on the ground the defendant partnerships as an entity are not subject to criminal liability under sections set forth.

ARGUMENT.

I.

A partnership is not a legal entity separate from the partners for the purposes of criminal liability.

(a) The Court has decided the issue as to "knowledge".

Based upon the cases cited by the government in its jurisdictional statement, it is apparent that the question it raised is unsubstantial. The word "knowingly" is used throughout our criminal law and needs no interpretation.

The legislature intended by the insertion of the word "knowingly" that the element of scienter be present before a person could be subjected to criminal liability for violation of 18 U. S. C. 835 (*supra*, p. 3) and 49 U. S. C. 322 (a) (*supra*, p. 2).

Although a Federal question is raised, the facts upon which it is made to depend have been explicitly decided by the court as to foreclose further argument on the subject, and thus cause the Federal question relied upon to be devoid of any substantial foundation or merit. *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 314. The word "knowingly" was decided in the case of *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337; *St. Johnsbury Trucking Company* v. *United States*, 220 F. 2d 393, 398; *United States* v. *Chicago Express, Inc.*, 235 F. 2d 785; *United States* v. *Illinois Central Railroad*, 303 U. S. 239.

In the *Boyce* case, *supra*, this Court stated:

> "The statute punishes only those who knowingly violate the regulation, 'and that' * * * the presence of the culpable intent is a necessary element of the offense * * *."

(b) Joint stock company.

The case of *United States* v. *Adams Express Co.*, 229 U. S. 381, cited by the government does not apply to the construction of said statutes or to the facts of the case at bar.

The case of *United States* v. *Adams Express Company*, involved a joint stock company, which under the constitution and laws of the State of New York was regarded and treated as a corporation. Under law a joint stock com-

pany is not affected by the death of one of its members or change in its membership. Nor does it possess the unlimited agencies which are attributes of partners. In addition, the interest of a shareholder in a joint stock association is readily transferable and the shareholders enjoy limited liability.

(c) A partnership is not a separate entity.

The Court relied heavily upon the corporate theory in holding the Adams Express Company subject to criminal liability.

There is no finding in the case of *United States* v. *Adams Express Company*, even under the statute involved in that case, that a partnership, as a separate entity and distinguished from a joint stock association, would be subject to the statute involved in that case.

A partnership is not a separate entity but consists of the individual partners.

A partnership has no existence separate from its component members. A partnership is not a legal entity separate and distinct from its partners but is a voluntary association to carry on as co-owners a business for profit. *Dora Neustadter* v. *United Exposition Service Co.*, a partnership, 14 N. J. Super. 484 (1951); *Rudolph Products Co.* v. *Manning*, 83 F. Supp. 857; 176 F. 2nd 190 (C. A.) (1949).

Thus it follows that since a partnership for the purposes of criminal liability is not a separate entity, it is necessary to show that the partners had knowledge of the charges alleged.

In *Boyce Motor Lines* v. *United States*, 342 U. S. 337 (1952), the Court made it clear that an essential element

of the crime under said statute 18 U. S. C. 835 was that Congress manifests a purpose to punish "only those who knowingly" violate the regulations. Knowledge is also an element in order to violate 49 U. S. C. 322 (a).

The government in the present case contends that a partnership is an entity separate from the partners who comprise it. The government seeks to create a fictional entity out of a simple partnership solely for the purpose of eliminating the necessity of proving guilty knowledge in the individual partners. The government fails completely to cite any authority to support its contention.

The government erroneously presumes that once an organization has been established as an entity, irrespective of the requirement of proof of a specific criminal intent in a statute, that vicarious criminal liability would automatically flow. Under Federal law, the decisions have not supported such a contention and there has been a refusal by the courts to extend vicarious criminal responsibility beyond corporations. *United Brotherhood of Carpenters and Joiners* v. *United States*, 330 U. S. 395.

Inasmuch as corporations are concerned, the guilty knowledge of its agents may be imputed to the corporation because a corporation can only act through its agents, and of course, a corporation can not be imprisoned. *Inland Freight Lines* v. *United States*, 191 F. 2d 313.

The criminal law is well established as to the rule that guilt is personal and that as to non-corporate employers, the civil law doctrine of respondeat superior does not apply.

(d) Criminal guilt is personal.

United States v. *Kemble,* 198 F. 2d 889; *Lurding* v. *United States,* 179 F. 2d 419; *Nobile* v. *United States,* 284 F. 253. In *United States* v. *Kemble,* the court states as follows:

> "• • • In the Carpenters case, the Supreme Court reasoned that under the quoted language, liability may not be predicated on a showing which would satisfy merely the requirements of the tort doctrine of *respondeat superior* or even the stricter normal criminal law doctrine which defines the area of corporate criminal responsibility for the acts of officers and agents in the course or scope of employment. • • •
>
> • • • However, even normal criminal responsibility does not extend that far. In this regard the criminal law doctrine is so well settled that its exposition in contemporary judicial opinions is rare. However, some years ago in Nobile *v.* United States, 3 Cir., 1922, 284 F. 253, 255, this court did have occasion to point out that criminal liability of a principal or master for the act of his agent or servant does not extend so far as his civil liability. He cannot be held criminally for the acts of his agent, contrary to his order and without authority, express or implied, merely because it is in the course of his business and within the scope of the agent's employment, though he might be liable civilly." See also *United States* v. *Food and Grocery Bureau,* D. C., S. D. Cal. 1942, 43 F. Supp. 966, 971.

The government in its jurisdictional statement asserts from a mere examination of 1 U. S. C. 1, 49 U. S. C. 303 (a), that a partnership and co-partnerships are entities separate from the partners who comprise them.

The key to 18 U. S. C. 835, 49 U. S. C. 322 (a), is the meaning of the words "whoever" and "knowingly" read in conjunction with the word "co-partnership" in 49 U. S. C. 322 (a) and "partnership" in 1 U. S. C. 1. These statutes do not define that relationship. Consequently, the word "partnership" and "co-partnership," must be given their plain established meaning since there is no contrary congressional intent expressed in 18 U. S. C. 835 and 49 U. S. C. 322 (a).

The requirement of specific criminal intent as an essential element of the crime under 18 U. S. C. 835 and 49 U. S. C. 322 (a) manifests a congressional purpose to punish those who "knowingly violate the regulations."

The government's theory that a partnership is separate from the partners who comprise it is contrary to the very nature of substantive law, both civil and criminal. In criminal law, guilt is personal, and as to non-corporate employers like the appellees herein, there can be no vicarious criminal liability.

The government in its jurisdictional statement failed to offer any authority in substantive law for considering a partnership as an entity separate from the partners who comprise it, for the purpose of criminal liability.

(c) A similar question has already been before this Court.

The government in footnote three (3) page six (6) of its Jurisdictional Statement, sets forth a number of cases allegedly applying to partnerships, which were set forth in the matter of *United States* v. *American Freightways* case (October Term, 1956, No. 265): The Brief submitted by the attorney for the appellee, Martin Werner, Esq., sets

forth in detail cases wherein criminal proceedings could not be brought against a partnership as an entity.

The *American Freightways* decision is not the first decision relative to the words partnership, co-partnership, whoever and knowingly.

The *American Freightways* case has codified the established decision of this court into one single unit relative to the words in question and to the legislative intent as to the interpretation of these Interstate Commerce Commission regulations. In the *American Freightways* case, a partnership, composed of Allan J. Resler and Norman Forman, is identical with the case sub judice. In the *Resler* case, the government, on November 15, 1955, filed a criminal information charging the defendants, *Allan J. Resler and Norman Forman, d/b/a American Freightways Company,* with violation of three regulations of the Interstate Commerce Commission pertaining to transportation of corrosive liquids in interstate commerce under Title 18 U. S. C. Section 835. It was stipulated by an oral bill of particulars by the government that it would not attempt to prove the defendants had direct knowledge of the shipment, but would proceed on the theory that the sum knowledge of their various employees could be imputed to the defendant partnership as an entity. The defendants moved to dismiss the information on the grounds that in criminal law, a partnership is not an entity separate and apart from the partners, and among other things, that the information failed to state a criminal offense against the United States. The District Court, by decision and order dated May 1, 1956, granted defendants' motion to dismiss the information and held:

> "Regardless of the wording of Title 1 U. S. C. Section 1 and Title 49 U. S. C. Section 303 (1) and

despite the various cases cited by the government dealing with the criminal responsibility attaching to unincorporated associations, it is the opinion of this court that a partnership is not a legal entity for purpose of criminal liability herein.

While criminal liability may lie against the individual partners, it may not lie against the partnership as an entity."

The government thereupon filed a notice of appeal to the United States Court of Appeals for the 2nd Circuit, dated May 29, 1956. The notice of appeal to the Supreme Court of the United States was filed in the District Court on May 31, 1956, alleging jurisdiction under 18 U. S. C. 3731. The Supreme Court of the United States, 77 Supreme Court 588, on March 4, 1957, in a per curiam opinion, affirmed the judgment of dismissal of the information by the lower Court.

II.

Congress could convert the offense into a so called "public welfare" offense.

The Court should look at the indicia of legislative intent *U. S.* v. *American Trucking Assn.*, 310 U. S. 534, 542, 544; *U. S.* v. *Dickerson*, 310 U. S. 554, 562.

The statute is plain. It provides that "whoever knowingly".

The offense requires an element of guilty knowledge or other specific mens rea.

If Congress thought the indicated requirement of proof would seriously hamper the effective enforcement of the Interstate Commerce Commission's regulations, the answer

is that Congress was at liberty to fix that by striking out the words "whoever, knowingly". By striking out the words "whoever knowingly", as applied to the regulation, Congress could then have converted the offense into a so-called "Public Welfare offense" requiring no element of guilty knowledge or other specific mens rea.

The best possible intent of the legislature is the language which it has employed—"whoever knowingly". *Boyce Motor Lines* v. *United States*, 342 U. S. 337.

The difficulty of sustaining the burden of proof imposed by the Statutes is no reason for adopting an interpretation which would conflict with the expressed requirement of specific intent. It is solely within the province of Congress to change the nature of the crime under said Statutes. Chief Judge Magruder's concurring opinion in the *St. Johnsburg* case, *supra*,

> "* * * If it be thought that the indicated requirement of proof will seriously hamper effective enforcement of the Interstate Commerce Commission regulations, the answer is that Congress is at liberty to fix that up by striking out 'knowingly'—as applied to violation of regulations of the sort here involved. That is to say, Congress could convert the offense into what sometimes has been called a 'public welfare offense,' requiring no element of guilty knowledge or other specific *mens rea*, by providing that whoever, by himself or by agent, transports explosives, poison gas, flammable solids, or other dangerous commodities without the safeguards which may be prescribed by a lawful regulation of the Interstate Commerce Commission, shall be guilty of a public offense and subject to penalty. See the discussion in Morissette *v.* United States (1952), 342 U. S. 246, 252-260, 72 S. Ct. 240, 96 L. Ed. 288."

As far as criminal responsibility is concerned, a partnership is identically the same as an individual employer, except that, instead of one individual conducting business under a trade name, it is two or more individuals doing so. Following this line of reasoning, it is obvious the government cannot contend that an individual doing business under a trade name could be charged with a crime as an entity separate from the individual himself where the government similarly lacked evidence of guilty knowledge in that individual. It thus follows that the individuals who comprise a partnership and who conduct their business under a partnership name, cannot be found guilty where there is a lack of evidence of guilty knowledge on the part of those individuals. If it were otherwise, the individual partners who were proven to have guilty knowledge, could avoid imprisonment by claiming that the partnership as an entity is liable for the violation and that they are not personally liable. The statute requires proof of guilty knowledge only on the part of the partners in order to convict the partnership. The government admits that it has no such proof.

Conclusion.

Wherefore, it is respectfully requested that the order of the United States District Court for the District of New Jersey dismissing the informations be affirmed.

Respectfully submitted,

/s/ August W. Heckman,
August W. Heckman,
Counsel for Appellees.

/s/ Anthony J. Cioffi,
Anthony J. Cioffi,
Of Counsel.

APPENDIX.

Order of July 5, 1956, Dismissing Criminal Information.

United States District Court

DISTRICT OF NEW JERSEY.

Criminal No. 252-56.

UNITED STATES OF AMERICA

v.

A & P TRUCKING CO., a partnership composed of ALEX SCHUB, ALDO IAFRATE, and ARTHUR CLOUGH; and SOL LIEBMAN, Defendants.

This matter having come before the Court upon motion by the defendant A & P Trucking Co., a partnership, Anthony J. Cioffi, Esquire, appearing for the defendant, and Frederic C. Ritger, Jr., Esquire, Assistant United States Attorney, appearing for the government; and it appearing that the United States Attorney has charged the A & P Trucking Co., a partnership, as the defendant in a criminal information setting forth violations of regulations of the Interstate Commerce Commission; and the Court having decided that the defendant partnership as an entity is not subject to criminal liability under the section set forth, it is on this 13th day of November, 1957,

ORDERED, that the criminal information filed with the Clerk of this Court on July 5, 1956, be and the same is hereby dismissed.

/s/ WILLIAM F. SMITH,
United States District Judge.

We consent to the form of the foregoing Order.

/s/ AUGUST W. HECKMAN
August W. Heckman
Attorney for Defendant.

/s/ ANTHONY J. CIOFFI
Anthony J. Cioffi
(Of Counsel)

Order of July 6, 1956, Dismissing Criminal Information.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY.

Criminal No. 261-56.

UNITED STATES OF AMERICA

v.

HOPLA TRUCKING COMPANY, a partnership composed of WILLIAM LEVINE and MELVIN ULRICH.

This matter having come before the Court upon motion by the defendant, Hopla Trucking Company, a partnership, Anthony J. Cioffi, Esquire, appearing for the defendant, and Frederic C. Ritger, Jr., Esquire, Assistant United States Attorney, appearing for the government; and it appearing that the United States Attorney has charged the Hopla Trucking Company, a partnership, as the defendant in a criminal information setting forth violations of regulations of the Interstate Commerce Commission; and the Court having decided that the defendant partnership as an entity is not subject to criminal liability under the section set forth, it is on this 13th day of November, 1957,

ORDERED that the criminal information filed with the Clerk of this Court on July 6, 1956, be and the same is hereby dismissed.

/s/ WILLIAM F. SMITH,
United States District Judge.

We consent to the form of the foregoing Order.

/s/ AUGUST W. HECKMAN
August W. Heckman
Attorney for Defendant.

/s/ ANTHONY J. CIOFFI
Anthony J. Cioffi
(Of Counsel)